

**STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF FINANCIAL INSTITUTIONS**

IN THE MATTER OF: : CASE NO. 04-0417-LOD
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 :
Michael A. Vlcek : James J. Lawrence, Hearing Officer

**ADMINISTRATIVE HEARING OFFICER'S
REPORT AND RECOMMENDATION
November 16, 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 1:00 p.m. on September 20, 2004, at 77 South High Street, Columbus, Ohio. The hearing was held at the request of Respondent Michael A. Vlcek (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 theft in 2001 and that he failed to disclose this conviction on his loan officer application filed in September of 2002. 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 violated R.C. 1322.07 (A), (B) and (C) by failing to disclose a criminal conviction on his loan officer application filed in September of 2002 and, therefore, did not comply with R.C. 1322.01 to 1322.12 as required by R.C. 1322.041(A)(2);
2. 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

not commit such an offense again as required by R.C. 1322.041 (A) (3);

3. 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).

Anthony D. Siciliano, 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 1 through 10 were admitted into the record.

B. Jurisdiction and Procedural Matters

The Division issued the NOH to Respondent on June 16, 2004 by certified mail return receipt requested. (Exhibit 7.) The Division received the Respondent's hearing request on July 13, 2004. (Exhibit 8.) The Division scheduled the hearing for July 26, 2004 and, on its own motion, continued it to August 23, 2004. The hearing was further continued at the Respondent's request to September 20, 2004. The Division sent notices of the hearings by ordinary mail to the same address to which it mailed the NOH. (Exhibits 9 & 10.)

C. Respondent's Loan Officer Application

1. The Respondent filed a loan officer application on September 5, 2002. (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 or pleaded guilty to any criminal offense including, but not limited to, theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities?
3. In response to Question 5, the Respondent answered "No." (Exhibit 1.)
4. Respondent signed the application on August 19, 2002 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 Respondent completed and signed a National Background Check, Inc. Registration Form by which he gave permission to the Ohio Bureau of Criminal Identification and Investigation to release his criminal history information to the Division. This background check revealed that the Respondent had been charged with theft by the Cuyahoga County Sheriff's Office. (Exhibit 2.) By letter dated May 6, 2003, 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 charge or case. (Exhibit 3.)
6. The Respondent submitted a Journal Entry in Case No. CR 404190 that showed that on October 23, 2001 the Cuyahoga County Court of Common Pleas convicted the Respondent of theft, in violation of R.C. 2913.02, a fifth degree felony. The Court imposed a fine of \$2,500.00 and sentenced the Respondent to two years of community control under the supervision of the Adult Probation Department. (Exhibit 4.)
7. The Respondent explained that the offense occurred when he used his minor son's credit card to pay his rent in the amount of \$500.00. (TR at 24 - 25.) He insisted that he had his son's permission before he used the card. (TR at 20 - 21, 24.) However, the son's mother, the Respondent's ex wife, learned of his use of the card and pressed charges. He pled guilty to avoid having his son in the middle of a dispute between his father and mother. (TR at 23.)

D. Respondent's Failure to Disclose Conviction

1. The Respondent did not disclose the conviction on his loan officer application. (Exhibit 1; TR at 20.)
2. The Respondent stated that he did not disclose the conviction because at the time that he completed the application, he was in a room with fellow employees. The notary public was also an employee. He did not want his fellow employees to know about the conviction. (TR at 26.) However, he knew that the Division would discover the conviction because he signed the National Background Check, Inc. Registration Form giving them permission to obtain criminal history information pertaining to him. (TR at 27.)

E. Respondent's Reputation and Character.

1. The Respondent testified about his activities and employment since the conviction in 2001. He has been continuously employed as a loan officer since 2000. He has worked for several mortgage loan companies and is currently employed with First Ohio Bank and Lending. (TR at 28 – 30.) In 2000, he met his current wife, Darcie. (TR at 33, 42.) They have two children ages two and one (TR at 33.). Additionally, he pays child support for his two older children with his first wife. (TR at 33.)
2. Respondent's wife, Darcie, testified on his behalf. She stated that the Respondent is very hard working, that he is honest and faithful to her and that she believes that he is a good person. (TR at 42.)

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. 1322.041 (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.

(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 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.

* * *

(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 license under sections 1322.01 to 1322.07 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.

* * *

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.

DISCUSSION

1. The Respondent was convicted in the Cuyahoga County Court of Common Pleas of the offense of theft.

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 Respondent committed the offense that gave rise to this conviction more than three years ago. Moreover, the offense was deeply intertwined with the circumstances surrounding his divorce. Since then, the Respondent has remarried, had two children and been continuously employed in the mortgage loan industry. While circumstances surrounding the theft convictions, do not diminish the seriousness of the offense, the changed circumstances in the Respondent's life and the lack of any further offenses does diminish its weight as evidence against the Respondent's character and against the belief that the Respondent will conduct himself as a loan officer honestly and fairly. Based upon the 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 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.
3. The Division alleges that the Respondent's 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. However, the Respondent explained that he did not mean to deceive the Division; he was merely trying to protect his privacy from his fellow employees. Moreover, the Respondent signed the National Background Check, Inc. Registration Form that authorized the release of his criminal history information in the files of the Ohio Bureau of Criminal Identification and Investigation to the Division. He stated that he knew that simply answering "No" to question 5 would not prevent the Division from discovering his criminal history. The Respondent's failure to disclose the convictions in his response to question 5 shows poor judgment. He could have completed the application away from the office and had the attestation notarized by a different notary. However, the facts in this case do not show that the Respondent's failure to correctly answer question 5 on the application was 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.

4. R.C. 1322.041 provides, among other things, that since Respondent was convicted of theft, the Respondent must prove by the 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.
5. The Respondent testified that he has been a loan officer since 2000. Since the conviction for theft, he has worked for several mortgage loan companies and is currently employed by Ohio Bank and Lending. Also, since the conviction he has married, had two children, supports his family and pays child support to his ex wife. Moreover, the offense, while serious, occurred under unusual circumstances in the Respondent's life. He was going through a divorce. The testimony shows that he had the permission of the owner, his son, to use the credit card. He plead guilty to the offense to avoid placing his son in the middle of a dispute between his mother and his father. Therefore, the conviction itself is not strong evidence that the Respondent is untrustworthy, dishonest and likely to commit another similar offense again today. On the other hand, the Respondent's employment history and his stable family life since the conviction are strong evidence that he is trustworthy and honest and not likely to commit a similar offense again. The Respondent has shown by the 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.
6. When Respondent failed to disclose his convictions on his loan officer application, he did violate R. C. 1322.07(A), in that he omitted a material fact required by state law from a license application. In doing so, he failed to comply with R.C. 1322.01 to 1322.12.
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 show that the Respondent's violation of R.C. 1322.07 was done to protect his privacy. He did not omit the information to deceive or mislead the Division. 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 to the Respondent pursuant to R.C. 1322.041(A) and R.C. 1322.10(A)(1)(a).

Respectfully Submitted,

James J. Lawrence
Hearing Officer
November 16, 2004